No. 11,620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE F. BOVICH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

THE DISTRICT COURT ERRED IN DENYING LIBELANT RECOVERY UNDER HIS FIRST CAUSE OF ACTION BASED ON THE JONES ACT.

The libel alleged (A 4-5) and the answer admitted (A 11) that appellant was injured in the course of his employment while working as an able-bodied seaman on a merchant vessel owned and operated by the appellee. The proximate cause of the injury was ascribed in the libel (A 5-6): (1) To a negligent order of the boatswain of the vessel; (2) To a negligent failure of the appellee to furnish libelant with a safe place to work; (3) To negligent loading of the vessel.

Appellant's right to maintain an action based upon the Jones Act to recover damages for his injury is therefore plain. (46 U.S.C.A., sec. 688.) And equally

plain is appellant's right to enforce his cause of action under the Suits in Admiralty Act. (46 U.S.C.A., secs. 741-752; 50 U.S.C.A. Appx. sec. 1291.) A claim of such character is specifically exempted from the provisions of the Federal Tort Claims Act which appellee invokes in its brief. (28 U.S.C.A., sec. 943 (d); *American Stevedores v. Porello,* 67 S.Ct. 847, 851.)

It was admitted at the trial (A 38) and established by the evidence (A 58, 83) that Army stevedores were handling the winches and loading the vessel at the time appellant was injured. This situation prompts the appellee to contend in its brief (p. 8) that "In order to impose liability for alleged negligence of the United States Army, its personnel must, of course, be shown to be fellow servants of the appellant". The contention is unsound. The scope of the Jones Act is not limited to negligence of fellow servants. (*Mahnich v. Southern S.S. Co.,* 321 U.S. 96, 64 S.Ct. 455, 458, 88 L.Ed. 561.) It extends to the negligence of the employer, the negligence of the officers of the employer, *the negligence of the agents of the employer,* and the negligence of the employees of the employer. (*Lopoczyk v. Chester A. Poling, Inc.,* 2 Cir., 152 F2d 457, 459; *Sundberg v. Washington F. & O. Co.,* 9 Cir., 138 F2d 801, 803.)

In the ordinary case it is well settled that a stevedore working on a vessel in navigable waters is a seaman, and an employee, within the meaning of the Jones Act. (*Seas Shipping Co., Inc. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698.) But the appellee asserts that this is not the ordinary

case. They point out that here the stevedores were soldiers. They point to the decision of this court in *Standard Oil Co. v. United States,* 153 F2d 958, where it was held that the government is not a "master" and a soldier is not a "servant" within the meaning of section 49 (c) of the California Civil Code. That decision was in no way concerned with maritime law. Nor is it opposed to Judge McCormick's decision in *DeWitt v. United States,* 67 F. Supp. 61, where, in holding the government liable under maritime law for injury to a seaman on a merchant vessel caused by the negligence of a soldier-stevedore, he said at page 62:

> "We do not believe it necessary to characterize the soldier-winch driver of an 'employee' of the United States in order to make secure to the injured seaman the salutary provisions of the statutes created for his benefit. The relationship which existed between the winch driver and the respondents at the time of the injury to libelant, as shown by the depositions before us, places both men in the maritime service of respondents, and renders them both responsible for the injuries sustained by the libelant. *Hust v. Moore-McCormack Lines, Inc.,* 66 S.Ct. 1218, 1946 A.M.C. 727; see, also, *United States v. Marine,* 4 Cir., 155 F2d 456, 1946 A.M.C. 775."

Since it is obvious that the soldier-stevedores in the present case were at least "agents" of the appellee in the work they were performing at the time appellant was injured in the course of his employment as a seaman, it follows that his right of action under the Jones Act is plain. Moreover, the Federal Employers' Lia-

bility Act (45 U.S.C.A., sec. 51), incorporated into the Jones Act, makes the shipowner liable for injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees,. . . or by reason of any defect or insufficiency, due to its negligence, in its . . . appliances, machinery, . . . or other equipment". The doctrine of concurring negligence would therefore implicate the appellee regardless of whatever conclusion might be reached as to its responsibility for the negligence of soldier-stevedores. (*Rey v. Colonial Nav. Co.,* 2 Cir., 116 F2d 580, 583.)

At page 9 of its brief the appellee cites the cases of *Dobson v. United States,* 2 Cir., 27 F2d 807, and *Bradey v. United States,* D.C.N.Y., 1945 A.M.C. 777. They are not helpful. Each involved a claim by a member of the United States Navy under the Public Vessels Act. (46 U.S.C.A., sec. 781.) Each held that the Act was not available to navy men. That Act is in no way involved in this case, for as earlier pointed out the libel alleged and the answer admitted that the libelant was a seaman on a merchant vessel.

Turning to the question of negligence, the position of the appellee is that it was without fault and that appellant was wholly to blame for his own injury. The appellee has not denied that at the time of injury the appellant was complying with a mandatory order of the boatswain to go aft and move forward certain garbage cans then on the starboard side of the vessel. The appellee has not denied that the order was not prompted by any urgency or necessity requiring immediate moving of the garbage cans. The appellee has

not denied that at the time the order was given and at the time it was being executed cargo was being worked on the port side of the vessel, and that the passageway on the starboard side forward from the garbage cans was partly obstructed with cargo and partly strewed with garbage spilled from the cans when they had been emptied into the garbage barge earlier on the morning of the accident.

What is therefore apparent is that the order of the boatswain was inopportune and unnecessary, and that its inevitable effect was to require appellant to work in an unsafe place exposed to dangerous conditions from which injury might result. The appellee disputes this and argues that it furnished appellant with a safe place to work and a safe passageway forward because the deck on the port side of the vessel was unobstructed and could have been used by appellant. But it is a matter of common knowledge, and the evidence so shows (A 61-62), that a fundamental rule of safety drilled into the minds of all seamen is "Never walk on the side of the vessel on which cargo is being worked". Had the appellant violated this fundamental rule of safety with resulting injury, the appellee would have undoubtedly been more emphatic in terming appellant a "moron" and a "blindfolded seaman". (pp. 12-13.) It is reasonable to suppose that when the boatswain gave his inopportune and unnecessary order he knew that the seamen to whom the order was given would not violate the fundamental rule of safety mentioned. The evidence is plain that the appellant did not violate it. (A 83.) It was reasonable for the ap-

pellant to suppose that the passageway was left open between the large crates on the starboard side of the vessel in order that seamen could go between them. The opening was clearly an invitation for seamen to use such passageway. A seaman could not be expected to assume that if he accepted the invitation and used such passageway his employer would cause or permit the passageway to be closed or partly closed while he was passing through it in the course of his employment.

The situation here is not one in which a seaman in disobedience to the orders of his superior or with full knowledge of the danger deliberately selects a dangerous way when a safe way is open to him. Here we have a situation where only ways of danger were open to appellant because of the negligent, inopportune, and unnecessary order of the boatswain. The way he selected was not more dangerous than the way he rejected. If the way he selected became the more dangerous way it was because of events occurring after he selected the way and was passing through it, and it became the way of danger only because of additional negligence on the part of his employer. It is idle for appellee to contend that it could not be expected to stop all loading operations merely because two seamen were ordered to move a few garbage cans a few feet forward. The answer is that the boatswain should not have given his negligent, inopportune, and unnecessary order to move the garbage cans while loading operations jeopardizing the safety of the sea-

man were in progress. Under settled law cited in the opening brief (pp. 8-11) it follows that appellant did not assume the risk of obedience to the boatswain's order, and it would be contrary to law to say that appellee was without fault and that appellant was wholly to blame for his own injury.

The position of appellee is not supported by the cases cited in its brief. In *Johnson v. United States,* 2 Cir., 74 F2d 703, cited at page 15, a seaman was washed overboard during monsoon weather while crossing the exposed well deck. He was not obeying any orders of his superiors. On the contrary, he was disobeying their general admonitions not to go over the open deck but to use a shaft tunnel in such rough weather as existed at the time of accident. The case furnishes no parallel. In *Hardie v. New York etc. Corp.,* 2 Cir., 9 F2d 545, the action was by a ship repairer against his employer. In going to his work two ways were open to him—one dark and one lighted. His fellow-employees used the way of light and were uninjured. He used the way of darkness and was injured. The case was not in admiralty. The case of *Tampa Interocean S.S. Co. v. Jorgensen,* 5 Cir., 93 F2d 927, cited at page 17, is authority for appellant. In complying with an order of a boatswain Jorgensen selected a way which he did not know was unsafe when he selected it. In affirming a judgment in Jorgensen's favor the court held that the boatswain's order was negligent. In *Holm v. Cities Service Transp. Co.,* 2 Cir., 60 F2d 721, the seaman was not obeying an

order of his superiors when injured. In *The Nacoochee,* D.C. Mass., 275 F. 876, the charge of negligence was that the first mate ordered the quartermaster to do work for which he was not fitted. The court merely held that the evidence showed that the quartermaster was well fitted to do such work. In *Seas Shipping Co. v. Ward,* 9 Cir., 22 F2d 251, cited at page 18, a longshoreman was ordered by the mate to remove a hatch cover. The existence of a hole under the cover was open and apparent. The longshoreman nevertheless fell into the hole while removing the cover. The case was clearly one of nonliability and offers no parallel to the present case. In *Lynch v. United States,* D.C. N.Y., 1947 A.M.C. 780, 783, cited at pages 18 and 19, an electrician's helper on a night shift was sent aboard a ship with a repair gang. He fell through an open hatch cover, while passing from his place of work to the gangway. There was an illuminated passageway around the hatch, and he chose to cross the hatch where there was no light. The holding of the court was that the libelant had been provided with a safe place to work and that he fell into the open hatch because of his own contributory negligence. The case offers no parallel. It may be mentioned that the decision was appealed and is still pending and undetermined in the Circuit Court of Appeals.

CONCLUSION.

Appellant therefore again respectfully submits that the decree of the District Court dismissing the first cause of action in the libel should be reversed, and a decree entered awarding the libelant and appellant appropriate damages on the said first cause of action.

Dated, San Francisco,
October 8, 1947.

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